STATE OF MICHIGAN

COURT OF APPEALS

FAMIKA JACKSON,

Plaintiff-Appellant,

v

FLAGSTAR BANK and TROTT & TROTT, P.C.,

Defendants-Appellees.

UNPUBLISHED
December 16, 2008

No. 281333
Wayne Circuit Court
LC No. 06-629445-CZ

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting defendants' motion for summary disposition. We reverse the grant of summary disposition on plaintiff's Fair Debt Collection Practices Act claim and remand. This appeal has been decided without oral argument. MCR 7.214(E).

Plaintiff obtained a loan secured by a mortgage issued to Mortgage Electronic Registration System (MERS), the lender's "nominee." Defendant Flagstar bank serviced the loan. After plaintiff defaulted, Flagstar referred the matter to the Trott & Trott law firm for the initiation of foreclosure proceedings. The mortgage was foreclosed by advertisement pursuant to MCL 600.3201 *et seq.*, and plaintiff failed to redeem the property. She then filed this action, alleging in part that defendants violated the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq*. The circuit court dismissed that claim on defendants' motion, and plaintiff now appeals.[1]

The circuit court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). Summary disposition is properly granted when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

[1] Plaintiff's complaint included two other claims that were also dismissed, but they are not at issue in this appeal.

Plaintiff first argues that the statutes governing foreclosure by advertisement are unconstitutional because the foreclosure proceedings did not afford her the opportunity for a hearing to challenge the debt. Constitutional questions are reviewed de novo on appeal. *Gillie, supra* at 344. "Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "It is unquestioned that state action is required in order to assert a denial of due process under both the Michigan and United States Constitutions." *Nat'l Airport Corp v Wayne Bank*, 73 Mich App 572; 574; 252 NW2d 519 (1977).

Plaintiff's reliance on *Northrip v Fed Nat'l Mortgage Ass'n*, 372 F Supp 594 (ED Mich, 1974), is misplaced because that decision was reversed in *Northrip v Fed Nat'l Mortgage Ass'n*, 527 F2d 23, 26-29 (CA 6, 1975). The law is now clear that "foreclosure by advertisement is not a judicial action and does not involve state action for purposes of the Due Process Clause[.]" *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994). Further, to the extent that plaintiff raises issues concerning proceedings in a separate district court case, those issues are not properly before this Court. This appeal is limited to claims arising from the dismissal of plaintiff's circuit court action from which this appeal has been taken.

Plaintiff next argues that the circuit court erred by dismissing her claim for violation of the FDCPA. Statutory interpretation is a question of law that is reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

Under the FDCPA, a debt collector must furnish certain information to the consumer, including notice of the right to dispute the validity of the debt or any part thereof. If the consumer disputes the debt in writing within 30 days, the debt collector must verify the debt and provide verification to the consumer. 15 USC 1692g(a). Once the debt is disputed, collection activity must cease until the debt is verified and verification is provided to the consumer. 15 USC 1692g(b). Plaintiff claims that she disputed the debt secured by the mortgage and that defendants improperly proceeded with foreclosure without providing verification of the debt. Defendants argued that they were not subject to the FDCPA because they are not debt collectors.

The FDCPA defines "debt collector" to include "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 USC 1692a(6).

We recognize that in *Williams v Trott*, 822 F Supp 1266 (ED Mich, 1993), the federal district court held that in assisting a creditor with foreclosure of a mortgage and providing certain information to the debtor, Trott & Trott was not acting as a "debt collector" as defined by the FDCPA. However, *Williams* was decided before *Heintz v Jenkins*, 514 US 291, 299; 115 S Ct 1489; 131 L Ed 2d 395 (1995), in which the United States Supreme Court held that the FDCPA "applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." Thus, the only relevant consideration is whether the law firm's principal business is debt collection or, if not, whether the firm regularly collects debts on behalf of another. See *Barrows v Chase Manhattan Mortgage Corp*, 465 F Supp 2d 347, 356 (D NJ, 2006). Even the federal district court for the Eastern District of Michigan has declined to follow *Williams* in light of *Heintz*. See *Romberger v Wells Fargo Bank, NA*, unpublished

opinion of the United States District Court for the Eastern District of Michigan, issued August 14, 2008 (Docket No. 07-13210).

Here, defendant law firm did provide certain information regarding its debt collection practice that was required by the FDCPA, and its letters to plaintiff specifically stated, "THIS FIRM IS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT." In light of *Heintz* and its progeny, we conclude that the circuit court erred by concluding that there was no genuine issue of fact concerning defendant Trott & Trott's status as a debt collector under the FDCPA.

The circuit court did not separately consider Flagstar's status as a debt collector within the meaning of § 1692a(6). However, the court's failure to address an issue raised below will not preclude appellate review where the facts necessary for resolution of the issue have been provided. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994); *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996).

The FDCPA specifically excludes from the definition of "debt collector" "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person . . . ." 15 USC 1692a(6)(F)(iii). Defendant Flagstar contends that it comes within this exclusion because it was a loan servicer and the loan was not in default at the time it acquired it. The mere fact that defendant Flagstar services loans does not disqualify it from being a debt collector; the question is whether its principal business is debt collection or, if not, whether it regularly collects or attempts to collect debts owed to another. See *Oppong v First Union Mortgage Corp*, 407 F Supp 2d 658, 666-667 (ED Pa, 2005), vacated in part on other grounds 215 Fed Appx 114 (CA 3, 2007). With regard to whether the loan was or was not in default at the time defendant Flagstar acquired it, Flagstar has not identified any documents submitted below which established when it acquired the loan and whether that was before or after plaintiff defaulted. Quite simply, Flagstar failed to establish that there was no genuine issue of fact concerning its status as a debt collector, and summary disposition was therefore improper.

Finally, defendants failed to show that they were entitled to summary disposition with respect to whether they violated the FDCPA. Plaintiff claimed that defendants violated the FDCPA by continuing with debt collection activity after she disputed the debt. See 15 USC 1692g(b). Although defendants denied that plaintiff responded to a March 8 letter indicating that Flagstar had referred the matter to Trott & Trott for foreclosure and that plaintiff owed $178,212.89, plaintiff claimed that she responded to the letter. However, none of the parties presented any evidence below regarding this issue. Because there was no showing of the absence of a genuine issue of material fact with respect to this issue, summary disposition was not appropriate.

Plaintiff's FDCPA claim against defendants was improperly dismissed. We reverse the circuit court's grant of summary disposition on the FDCPA claim and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter